# IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

EPIC SYSTEMS CORPORATION,	)
Plaintiff,	)
V.	) Case No. 3:15-cv-00821-bbc
YOURCAREUNIVERSE, INC., MEDHOST, OF TENNESSEE, INC., AND MEDHOST DIRECT, INC.	) ) )
Defendants.	)

# DEFENDANTS' PROPOSED FINDINGS OF FACT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

In support of their motion for summary judgment, Defendants YourCareUniverse, Inc., MEDHOST of Tennessee, Inc., and MEDHOST Direct, Inc. (collectively, "Defendants") submit the following proposed findings of fact as to which there is no genuine dispute and which entitle them to judgment as a matter of law:

#### I. Jurisdiction

- 1. Plaintiff Epic Systems Corporation is a corporation organized under the laws of the state of Wisconsin with its principal place of business in Verona, Wisconsin. First Amended Complaint, Doc. 48, ¶ 1; Answer, Doc. 51, ¶ 1.
- 2. Defendant YourCareUniverse, Inc. ("YCU") is a corporation organized under the laws of the state of Delaware and has its principal place of business in Franklin, Tennessee. Doc. 48, ¶ 2; Doc. 51, ¶ 2.

<sup>&</sup>lt;sup>1</sup> The "Doc." References throughout these Proposed Findings of Fact pertain to the ECF docket entries in this case.

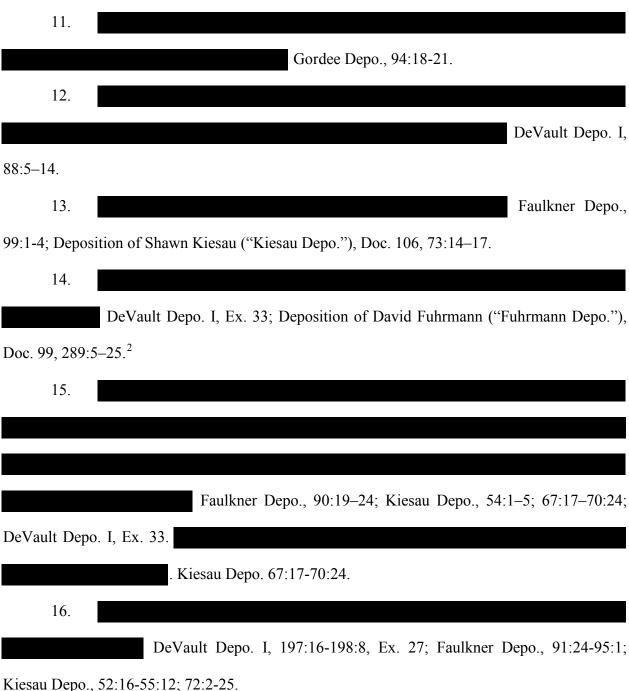
- 3. Defendant MEDHOST of Tennessee, Inc. ("MEDHOST TN") is a corporation organized under the laws of the state of Tennessee and has its principal place of business in Franklin, Tennessee. Doc. 48, ¶ 3; Doc. 51, ¶ 3.
- 4. Defendant MEDHOST Direct, Inc. is a corporation organized under the laws of the state of Tennessee and has its principal place of business in Franklin, Tennessee. Doc. 48, ¶ 4; Doc. 51, ¶ 4.
- 5. YCU, MEDHOST TN, and MEDHOST Direct are related or affiliated corporate entities. Doc. 48, ¶ 5; Doc. 51, ¶ 5.
- 6. The Defendants have consented to the personal jurisdiction of this Court based on the business they have transacted in the State of Wisconsin. Doc. 51, ¶ 9.
- 7. This Court has subject matter jurisdiction over this matter because it relates to claims arising under and relating to federal trademark law, 28 U.S.C. §§ 1338(a), (b), 1367. Doc. 48, ¶ 7; Doc. 51, ¶ 7.
- 8. Venue is proper in the Western District of Wisconsin pursuant to 28 U.S.C. § 1391 because a substantial part of the alleged events giving rise to these claims occurred in this district. Doc. 48,  $\P$  8; Doc. 51,  $\P$  8.

### II. Background of Epic and its CARE EVERYWHERE mark

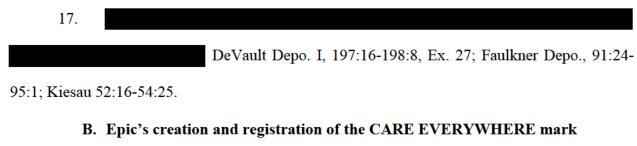
## A. Epic's business

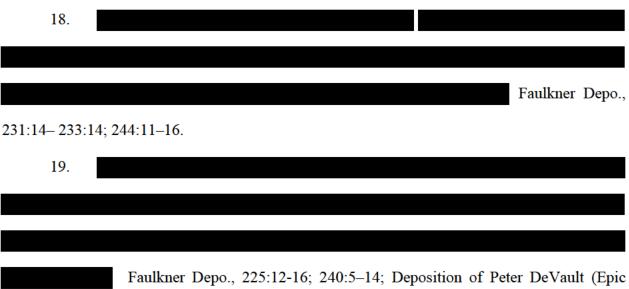
9.		
De	position of Judy Faulkner ("Faulkner Depo"), Doc. 97, 76:15–20.	
10.		
	Deposition of Peter DeVau	_ lt

(Aug. 22, 2016) ("DeVault Depo. I"), Doc. 92, 30:23–31:3; 88:5–14; Deposition of Jackie Gordee (Epic 30(b)(6) Corporate Rep.) ("Gordee Depo."), Doc. 101, 57:15-58:17.



<sup>&</sup>lt;sup>2</sup> The deposition exhibits referenced in these Proposed Findings of Fact are attached to the Declaration of David W. Holt ("Holt Decl."), Doc. 114.





20. Epic applied for federal registration of the CARE EVERYWHERE trademark on May 13, 2004. Faulkner Depo., Ex. 33; Deposition of Brad Paulson (Epic 30(b)(6) Corporate Rep.) ("Paulson Depo."), Doc. 109, 43:9–16.

30(b)(6) Corporate Rep., Nov. 10, 2016) ("DeVault Depo. II"), Doc. 94, 40:12–41:18.

21. Epic's CARE EVERYWHERE mark is registered in Class 9 of the International Trademark Class of goods. DeVault Depo. I, Ex. 33. Epic's trademark registration describes the goods associated with the CARE EVERYWHERE mark as follows:

Computer software for use in the healthcare field, namely software for entering, storing, editing, organizing, integrating, synchronizing, processing, accessing, managing, communicating and sharing data to, from, across and among multiple separate information systems, including heterogeneous systems, and user manuals and documentation packaged with such computer software.

DeVault Depo. I, Ex. 33; Faulkner Depo., Ex. 33.

- 22. The United States Patent and Trademark Office registered Epic's mark on June 28, 2005. DeVault Depo. I, Ex. 33; Faulkner Depo., Ex. 33; Paulson Depo., 43:9–16.
- 23. On May 12, 2011, Brad Paulson submitted a combined declaration of use and incontestability for the CARE EVERYWHERE mark on behalf of Epic. DeVault Depo. I, Ex. 26; Paulson Depo., 45:18–47:6.
- 24. Epic has never registered the CARE EVERYWHERE mark in the state of Wisconsin. Holt Decl., Ex. 33, Epic's Reponses to YCU's Second Set of Requests for Admission, Request No. 34.
- 25. Epic has never conducted any survey, poll, search, study, or other investigation to establish that CARE EVERYWHERE has acquired secondary meaning in the minds of any consumers, whether purchasers of CARE EVERYWHERE or their patients. Holt Decl., Ex. 33, Epic's Reponses to MEDHOST of TN's First Set of Requests for Admission, Request No. 8.

#### C. Epic's Care Everywhere product and its relation to other Epic products.

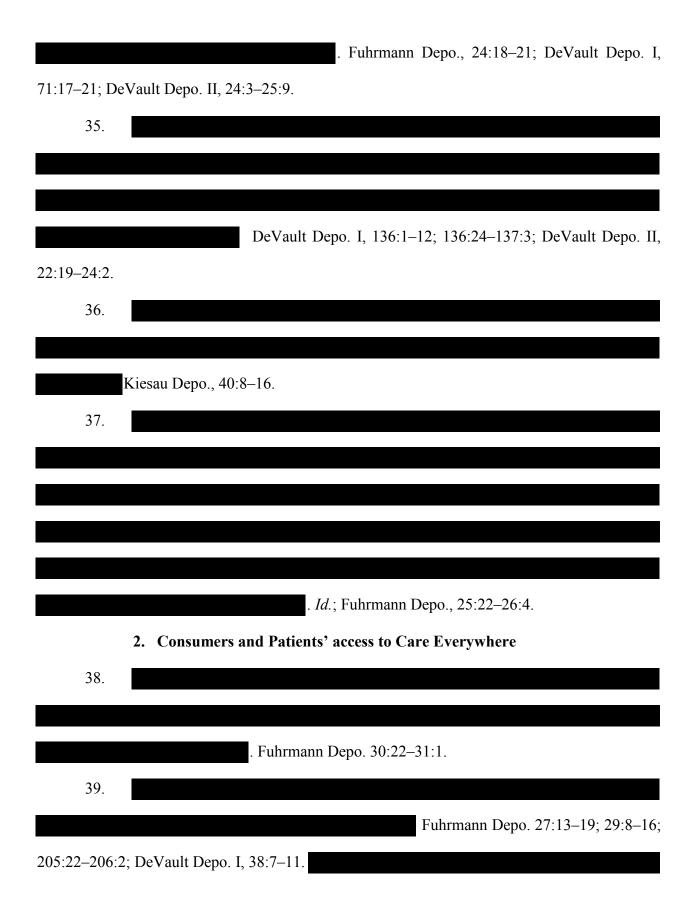
- 26. Epic uses the CARE EVERYWHERE mark to refer to its interoperability platform. Holt Decl., Ex. 33, Epic's Reponses to MEDHOST of TN's First Set of Requests for Admission, Request No. 7; DeVault Depo. II, 20:21–21:4.
- 27. Epic's CARE EVERYWHERE interoperability platform allows patient data to be exchanged between various end points, which includes Epic facilities, non-Epic facilities, personal health records, health information exchanges, and various governmental entities. Fuhrmann Depo., 39:3–5 (Care Everywhere "is the interoperability application that helps make sure that wherever patients go, their charts go with them."); DeVault Depo. I, 114:18–115:12; DeVault Depo. II App'x, 2:8–17.

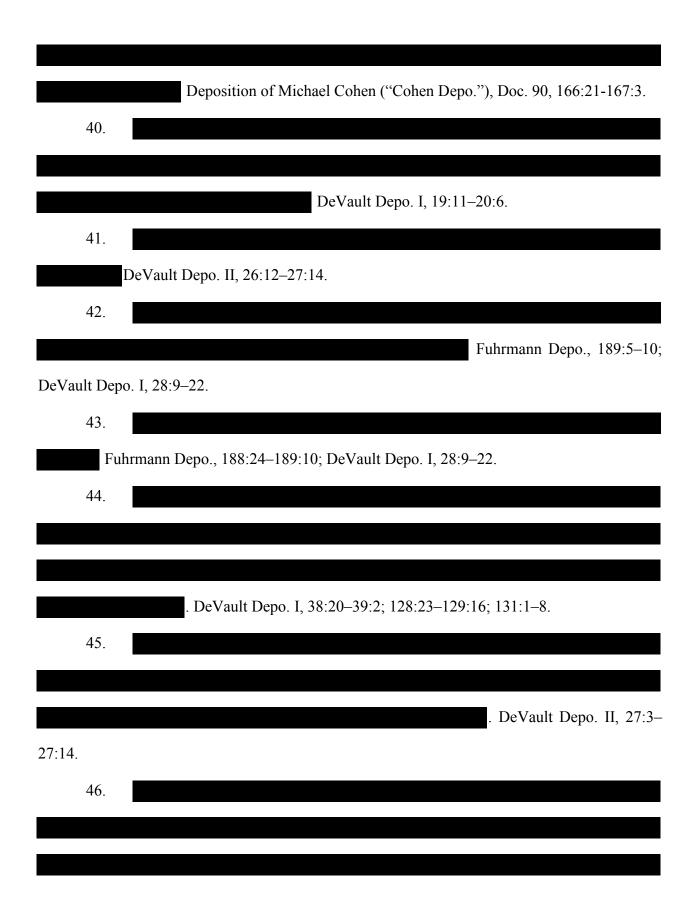
of where they are." Holt Decl., Ex. 33, Epic's Reponses to MEDHOST of TN's First Set of

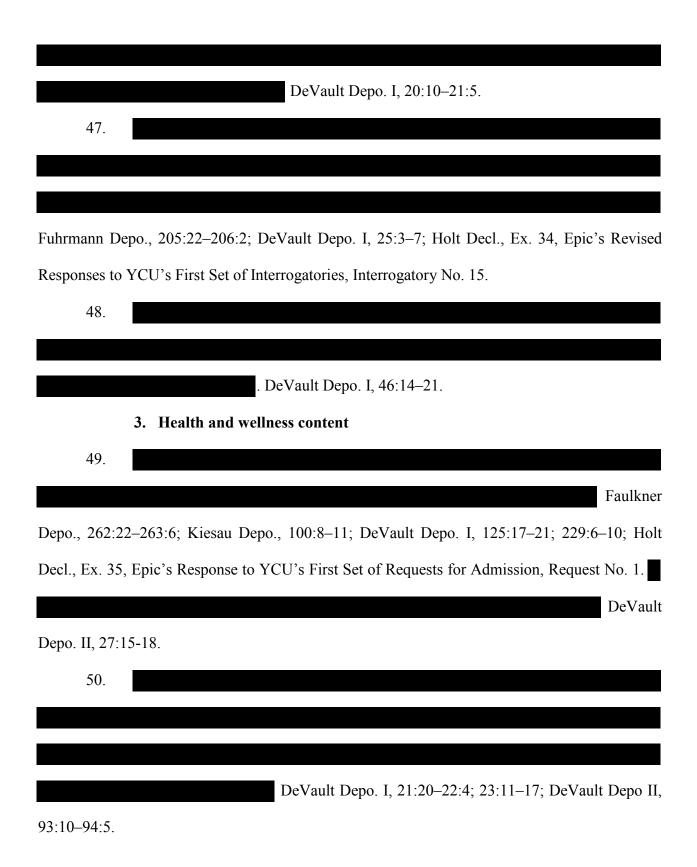
The purpose of Care Everywhere is to "help traveling patients get care regardless

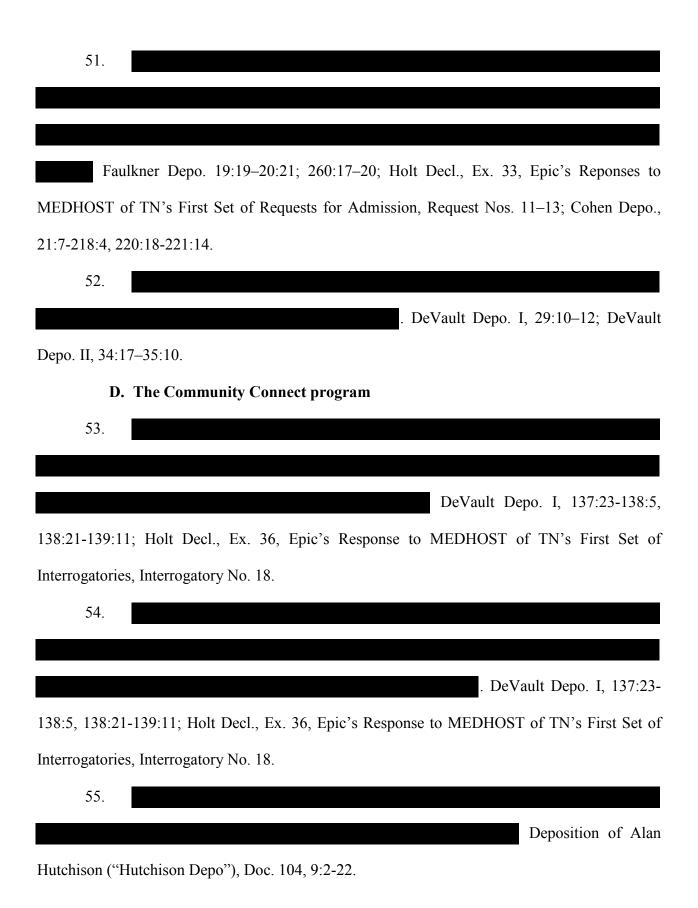
28.

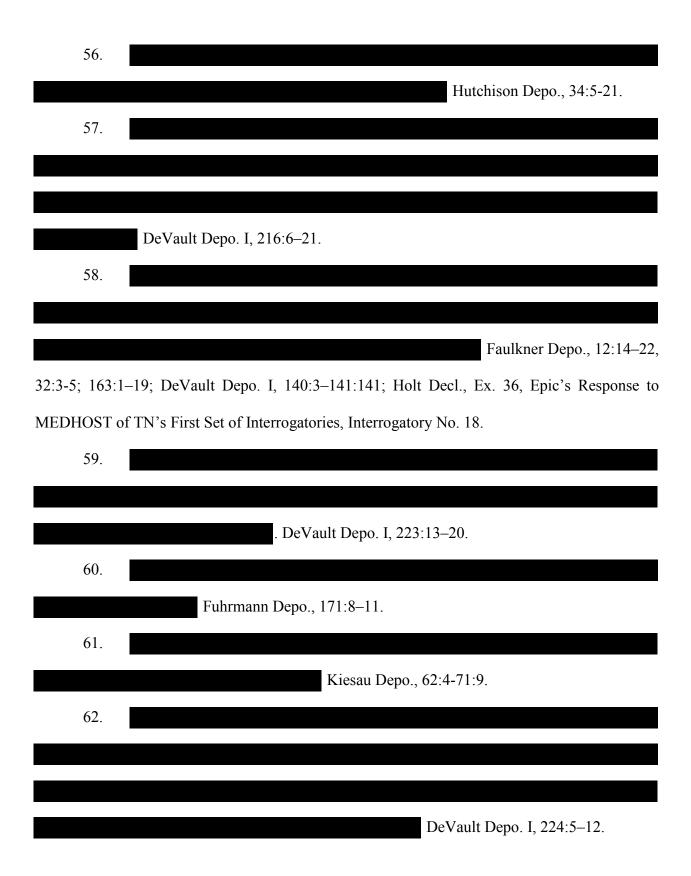
Requests for A	Admission, Request No. 39.
29.	
30.	
	Fuhrmann Depo., 18:1–4; Kiesau Depo., 31:3–14.
31.	
	Fuhrmann Depo. 18:5–8; 112:15–17; Faulkner Depo.,
89:2-4; DeVa	ult Depo. I, 88:15–21.
32.	
DeVaul	t Depo. II App'x, 2:3–3:5.
33.	
	. DeVault Depo. I, 38:7-11, 244: 2-5; DeVault
Depo. II, 24:3	–25:9.
	1. Providers' access to Care Everywhere
34.	





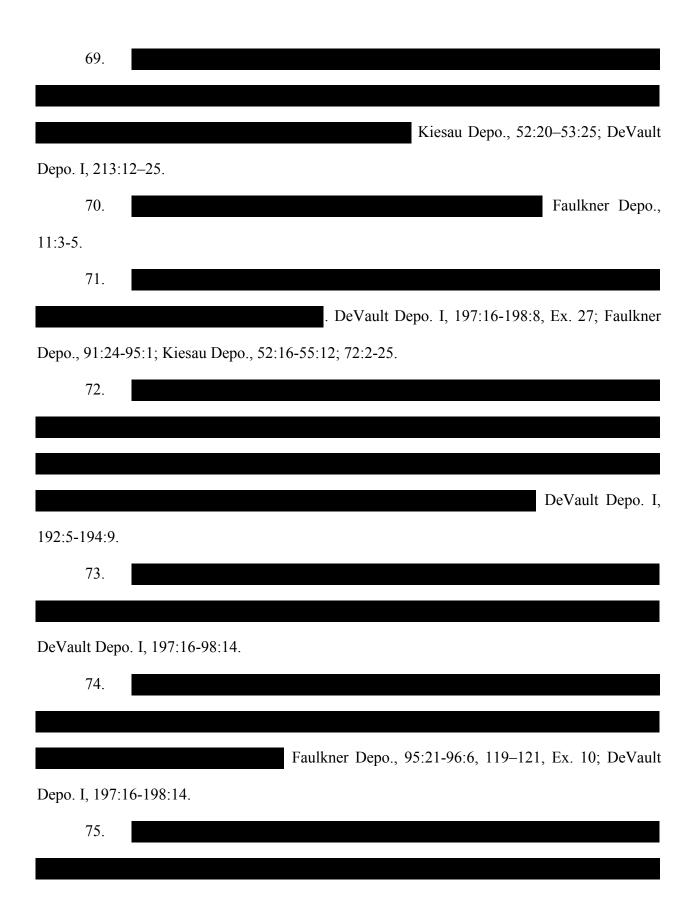


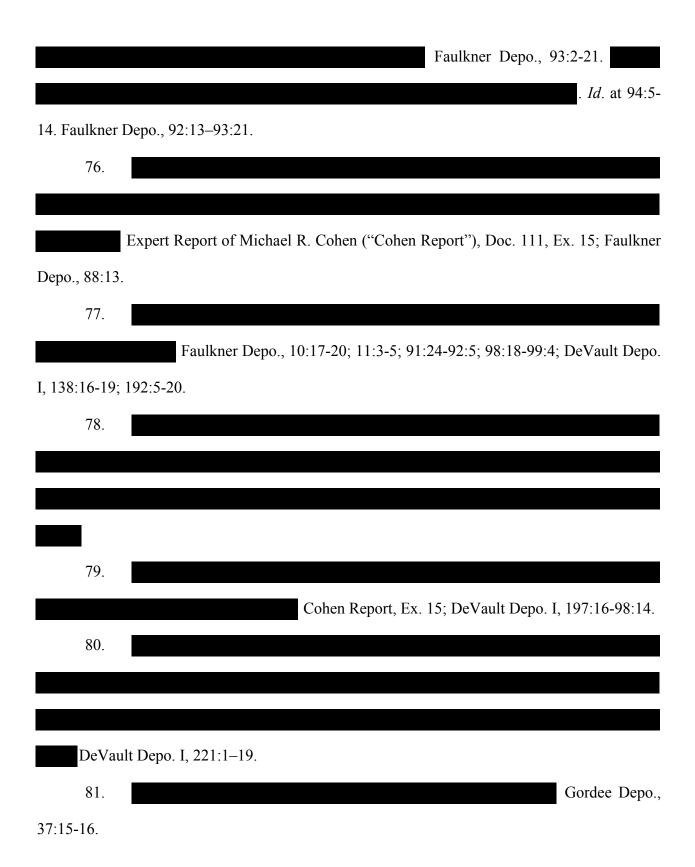


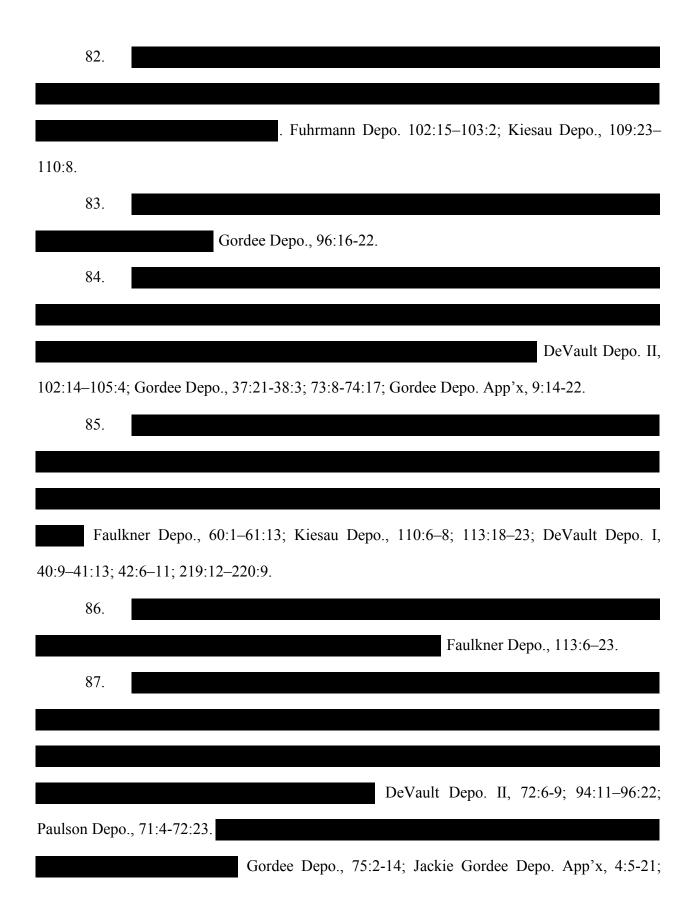


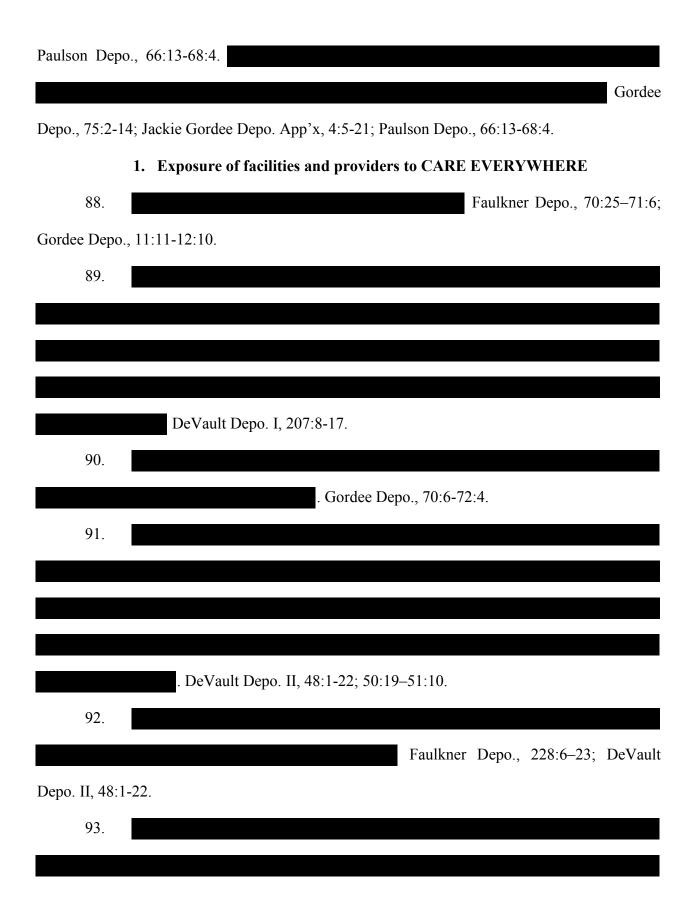
# E. Epic's marketing and sales 63. Faulkner Depo, 57:18–58:16; 64:15–65:5; Fuhrmann Depo., 66:2– 5; Kiesau Depo., 18:8–13; 151:16–152:1. 64. Kiesau Depo., 10:17-11:17. 65. . Faulkner Depo., 65:10–22; Kiesau Depo., 106:17–107:5; DeVault Depo. II, 91:7–92:6. DeVault Depo. II, 91:7-92:6 66. . Fuhrmann Depo. 66:8–10; Faulkner Depo., 58:3– 16; 68:9–15; Kiesau Depo., 16:15–17:9. 67. Kiesau, Depo., 17:10–18:3; 22:3-7; Gordee Depo., 73:22-3. 68. . Kiesau,

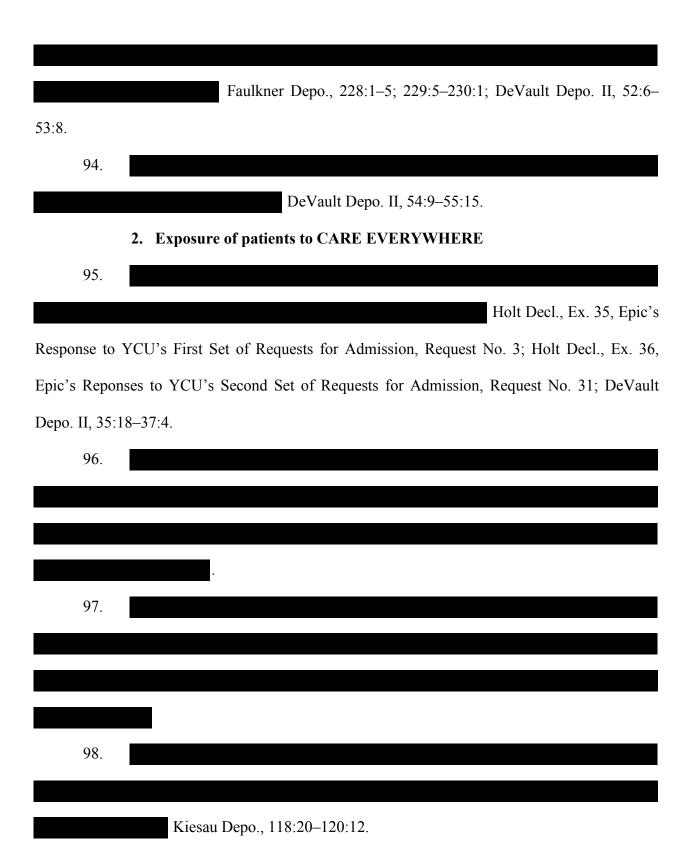
Depo., 17:10–18:3; 22:3–7; Gordee Depo., 82:3-7.











post public information such as FAQs on their website about the product. Holt Decl., Ex. 36,

Patients might also be exposed to CARE EVERYWHERE when Epic's customers

99.

100.	
Paulson Depo., 123:1–23; 125:7–12.	
101.	
Pau	lson
Depo., 137:6-10.	ISOII
Paulson D	epo.
137:11-138:16.	
102.	
Paulson Depo., 126:4–128:5; 129:12–20; DeVault Dep	90. I
Ex. 17 (attached as Ex. 3 to Holt Decl.).	
103.	
Paulson Depo., 129:21-130:12; DeV	'ault
Depo. I, Ex. 18 (attached as Ex. 4 to Holt Decl.).	
104.	

DeVault	Depo. I, Ex. 18.
105.	
	Paulson Depo., 130:16-132:11; DeVault Depo. I, Ex. 20 (attached
as Ex. 5 to Hol	t Decl.).
106.	
	Paulson Depo., 132:12–133:16; DeVault Depo. I, Ex. 21 (attached
as Ex. 6 to Hol	
107.	
107.	
	Doulgon Dono 122:17 124:17: DoVoult Dono I Ev. 22
(	Paulson Depo., 133:17–134:17; DeVault Depo. I, Ex. 22
	x. 7 to Holt Decl.).
108.	
	Paulson Depo., 134:18–135:16;
DeVault Depo	I, Ex. 23 (attached as Ex. 8 to Holt Decl.).
109.	
	DeVault Depo. I, Ex. 23.

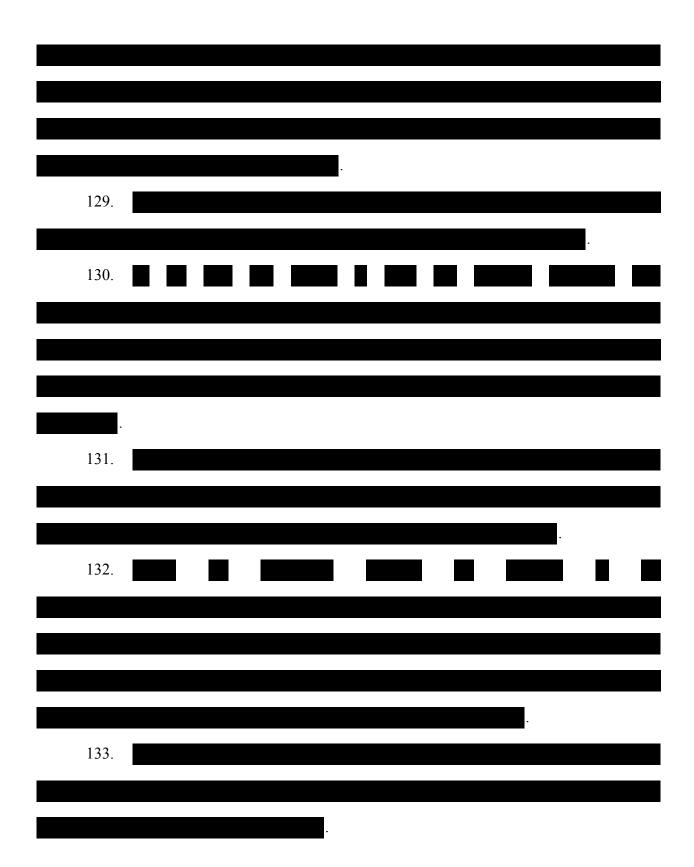
110.
DeVault Depo. I, Ex. 24 (attached as Ex. 9 to Holt Decl.).
111.
Kiesau Depo., 121:9–14; DeVault Depo. I, 128:23–129:16; Holt Decl., Ex. 36, Epic's
Responses to MEDHOST of TN's First Set of Interrogatories, Interrogatory Nos. 8, 17.
112.
Faulkner Depo., 271:7–277:17:, Ex. 41; Holt Decl., Ex. 36, Epic's Response to MEDHOST of
TN's First Set of Interrogatories, Interrogatory Nos. 8, 17; Holt Decl., Ex. 37, Epic's Response to
MEDHOST of TN's First Set of Requests for Production, Request No. 6; DeVault Depo II, 74:1-
75:9.
113.
III. Background of the Defendants and YCU's YOURCAREEVERYWHERE mark
A. MEDHOST's business
114.

115.

YCU offers a range of software tools and services that assist healthcare providers

in man	aging t	he business of healthcare. Hart Decl. at ¶ 5.
	116.	MEDHOST TN is the provider of the Enterprise EHR software system. Hart Decl
at ¶ 3.		
	117.	
	118.	
	В.	The Defendants' adoption of a YOURCARE family of marks and the creation of YCU
	119.	
	120.	
	121.	

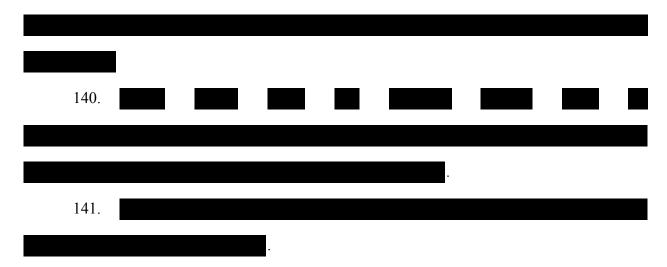
122.	
123.	Around that same time, the decision was made to brand the entire solution of
products as Y	OURCAREUNIVERSE and use a YOURCARE family of marks to identify the
individual pro	ducts. Mitchell Depo., 78:4–19; 74:12–21.
124.	
125.	
126.	
	The YOURCAREEVERYWHERE website and services
launched in M	arch 2015. Hart Decl. at ¶ 22.
127.	Concurrently with the launch of the YOURCAREEVERYWHERE website, YCU
engaged in	a marketing campaign designed to maximize awareness of the
YOURCARE	EVERYWHERE website and provider services. Hart Decl. at ¶ 23.
128.	



YCU's marketing activities for YOURCAREEVERYWHERE include online

134.

advertisemen	ts, social media,	and public re	lations, amon	g other things	. Hart Decl.	at ¶ 29.	
135.							
136.							
137.							
138.							
			·				
139.							



- 142. Consistent with the reasons for adopting the other YOURCARE-formative marks, YourCareUniverse and MEDHOST have developed and use a family of marks formed from the prefix YOURCARE in addition to YOURCAREEVERYWHERE, including these marks:
  - A. YOURCAREANALYTICS
  - B. YOURCARELINK
  - C. YOURCAREREFERRAL
  - D. YOURCARETRANSFER
  - E. YOURCAREHEALTH
  - F. YOURCAREPROVIDER
  - G. YOURCARESUCCESS
  - H. YOURCAREDATA
  - I. YOURCAREEXCHANGE
  - J. YOURCAREINTERACT
  - K. YOURCARENAVIGATION
  - L. YOURCAREWELLNESS
  - M. YOURCARECOMMUNITY

- N. YOURCAREKNOWLEDGE
- O. YOURCAREMESSENGER
- P. YOURCAREVISUALIZE

Hart Decl. at ¶ 7; Hart Depo., 111:23-116:24; Ex. 15 (attached as Ex. 19 to Holt Decl.); Deposition of Lauren Douglass ("Douglass Depo."), Doc. 95, 18:16-19:8.

C. The YourCareEverywhere website and its relation to the Defendants' other products

143.

144. Users of the YOURCAREEVERYWHERE website encounter the YOURCAREEVERYWHERE word mark and logo prominently displayed on the website's header and in other locations throughout the site. The YOURCAREEVERYWHERE logo appears as follows:



Hart Decl. at ¶ 9.

145. Users of the YOURCAREEVERYWHERE mobile application encounter the YOURCAREEVERYWHERE word mark and logo displayed in the app. The icon displayed on the mobile device for the app appears as follows:



Hart Decl. at ¶ 10.

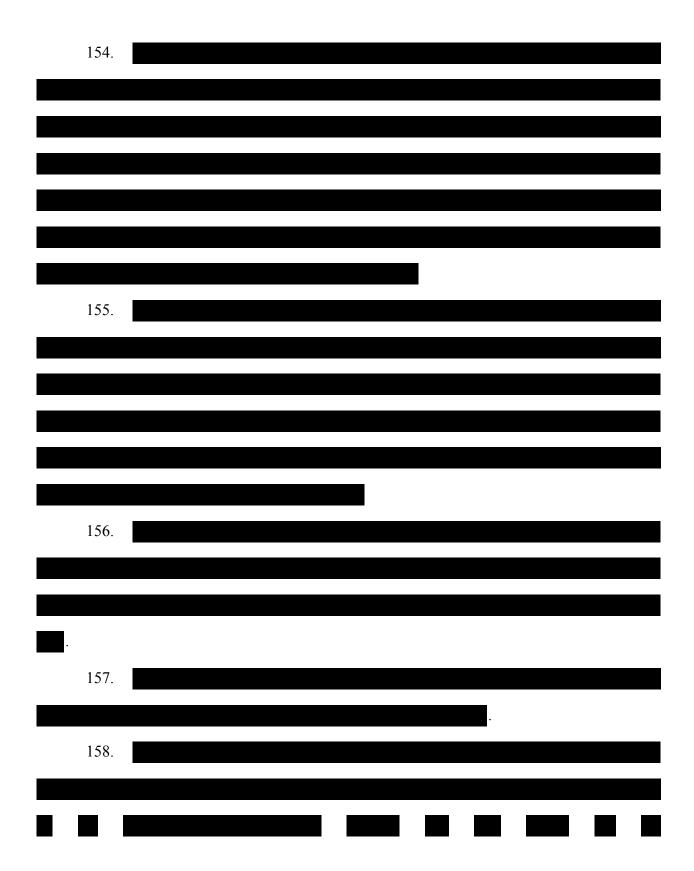
- 146. YCU uses the YOURCAREEVERYWHERE mark primarily in association with a consumer health and wellness content website, yourcareeverywhere.com. YCU also offers a related mobile app and marketing services under the YOURCAREEVERYWHERE mark. Hart Depo., 147:23-149-22; 21:12-15; 70:22-25.
- 147. YCU's patient portal product is called YOURCAREHEALTH. Anderson Depo., 27:16-20.

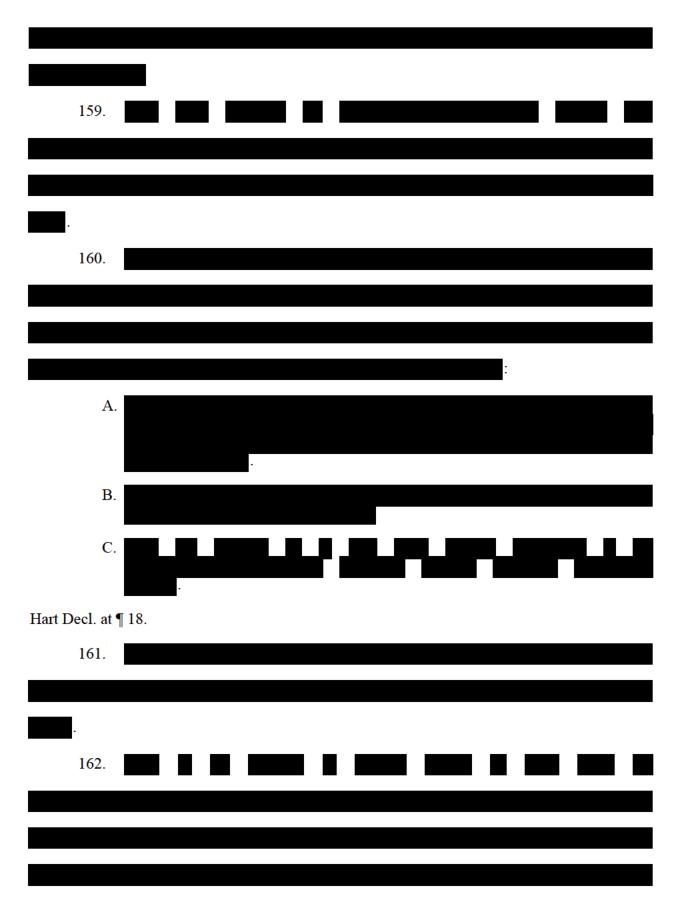
149.	
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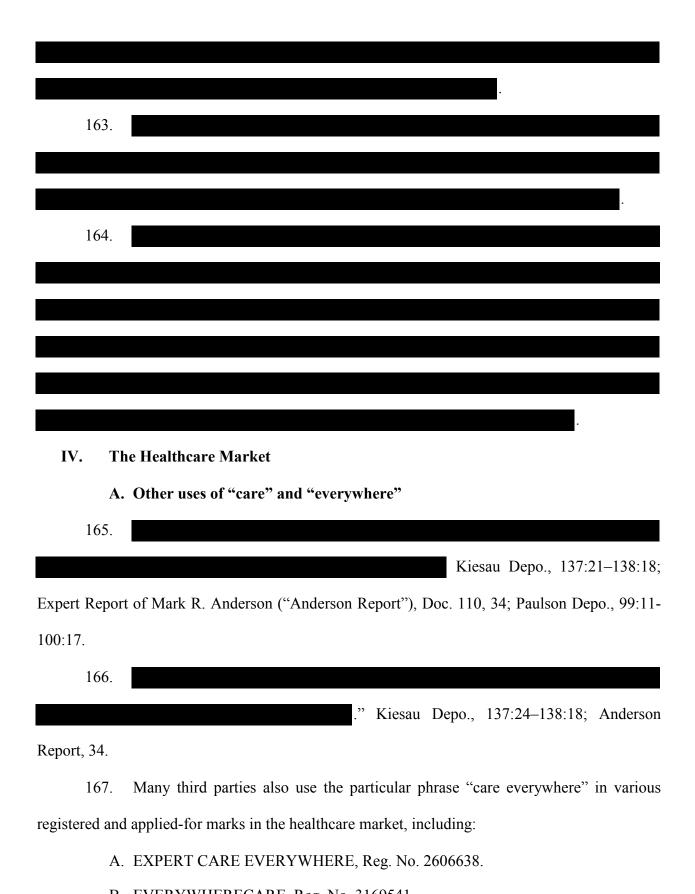
#### D. YCU and MEDHOST's marketing and sales

- 151. YCU considers the YOURCAREEVERYWHERE product a consumer focused (as opposed to a healthcare provider focused) brand. YCU primarily uses the YOURCAREEVERYWHERE Mark in connection with a free, publicly available website (<a href="https://www.yourcareeverywhere.com">www.yourcareeverywhere.com</a>) containing general information related to health and wellness topics and an associated smartphone application. Users of the YOURCAREEVERYWHERE website and app can access free articles and information related to health and wellness topics, such as articles related to diseases and conditions, healthcare news, pregnancy and childbirth, children and teen care, heart care, mental health, and exercise and nutrition. Hart Decl. at ¶ 8.
- 152. In addition to accessing health and wellness content, users of the YOURCAREEVERYWHERE website and app may also register an account. If a user registers an account, he or she may use their YOURCAREEVERYWHERE account to track certain health and wellness data, such as activity data from a Fitbit device. Hart Decl. at ¶ 11.

153.				
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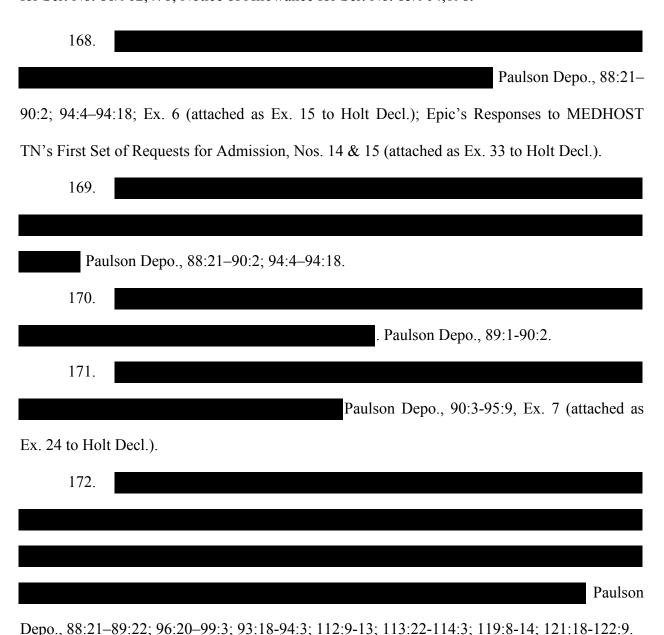




B. EVERYWHERECARE, Reg. No. 3169541.

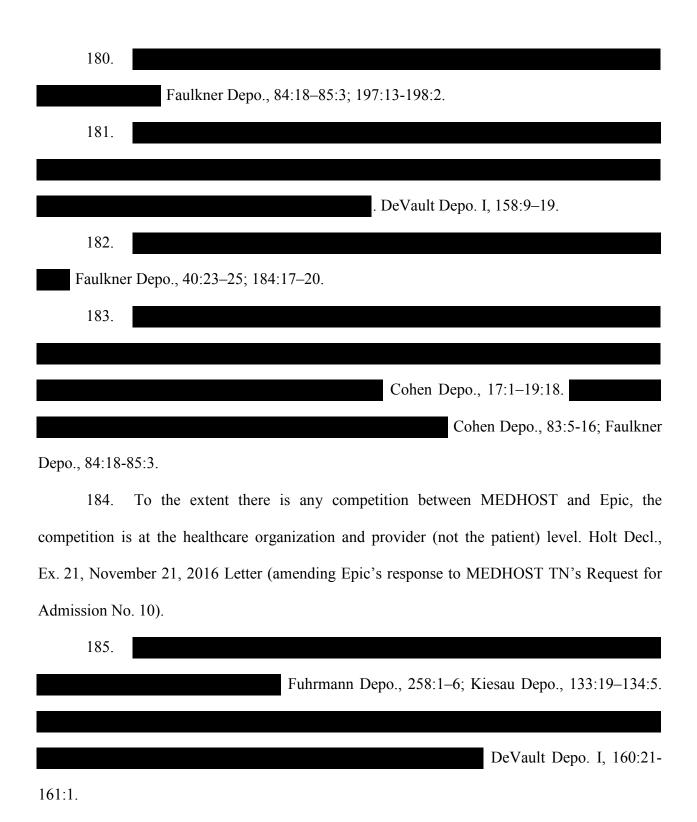
- C. HEALTHCARE EVERYWHERE, Ser. No. 86/902,476 is an application for which the trademark examining attorney found no conflicting marks that would bar registration. The applicant is simply required to disclaim the exclusive right to use "HEALTHCARE" apart from the mark.
- D. CARE. VIRTUALLY EVERYWHERE, Ser. No. 85/904,198 is an allowed application. Once a statement of use is filed, it will register.

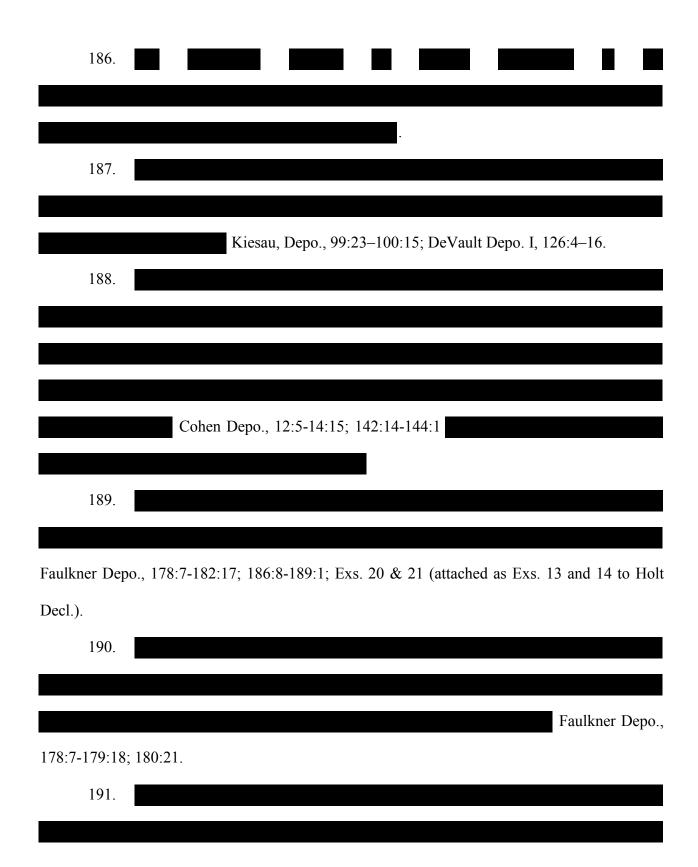
Cert. of Reg. No. 2606638; Cert. of Reg. No. 3169541; June 1, 2016 Trademark Office Action for Ser. No. 86/902,476; Notice of Allowance for Ser. No. 85/904,198.



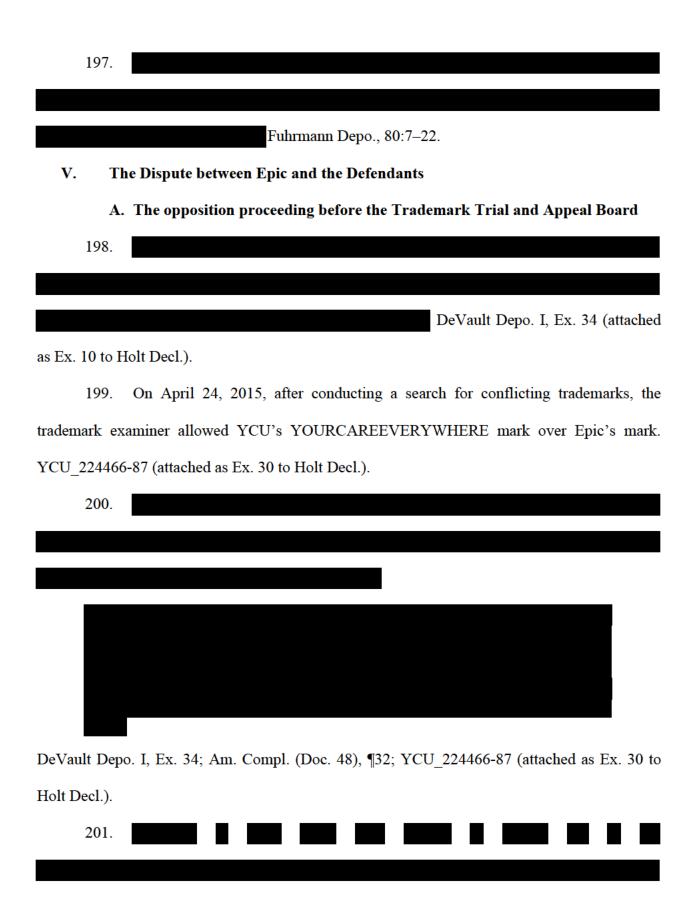
В.	Government regulation and Meaningful Use
173.	
DeV	Vault Depo. I, 35:16-36:1.
174.	Virtually all organizations, including MEDHOST and Epic, meet the U.S.
Government's	s certification requirements for meaningful use of healthcare technology because
is required to	survive in the industry. Anderson Depo., 24:21-26:10; 46:21-47:2.
175.	
	. DeVault Depo. I, 155:19–23; 232:1–10
Anderson Dep	00., 55:9-56:23.
176.	
	DeVault Depo. I, 128:23129:16.
177.	
178.	
170.	
C	Lack of competition between the Defendants and Epic
179.	Lack of competition between the Detenuants and Epic

Faulkner Depo., 39:13–16, 21–25.





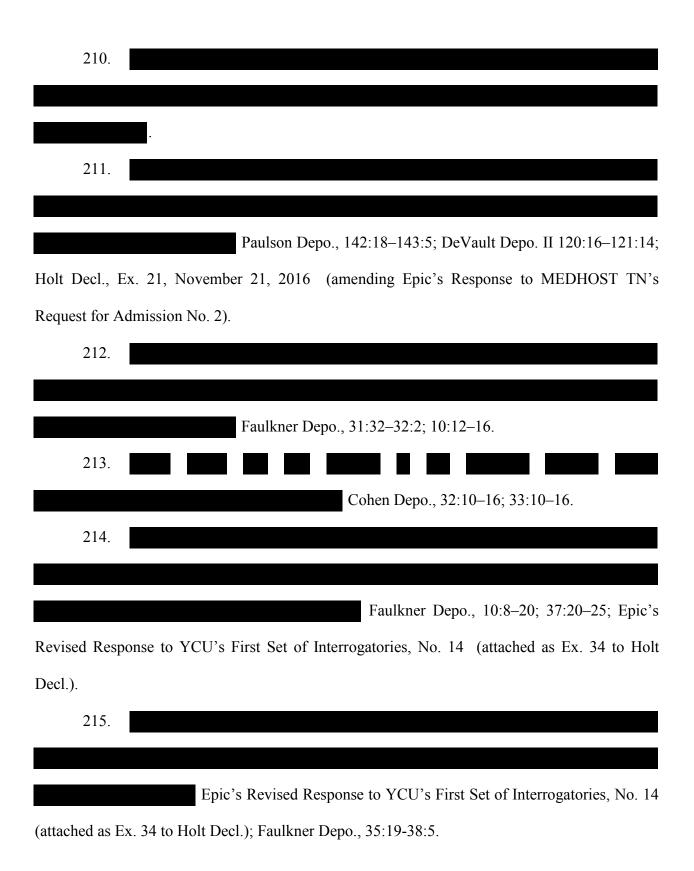
Cohen Depo., 152:21-153:13; Faulkner Depo., Ex. 21 (attached as Ex. 14 to Holt Decl.). D. Sophistication of participants in the market 192. Faulkner Depo., 31:32– 32:2; 10:12–16. 193. Faulkner Depo., 70:25–71:6; DeVault Depo. I, 263:1–6; Gordee Depo., 11:20-13:19; 70:1-73:7. 194. Gordee Depo., 70:6-73:7. 195. Faulkner Depo., 270:3–271:4; DeVault Depo. I, 222:3–6; Gordee Depo, 74:21-75:14. 196. Fuhrmann Depo., 171:8-11; DeVault Depo. I, 224:5-12; Kiesau Depo., 40:8–16.

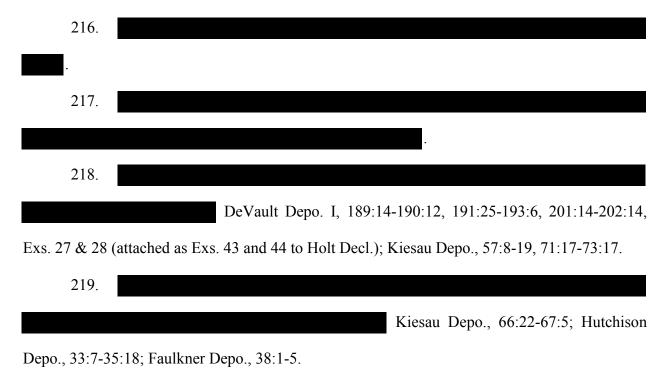


- ¶ 30; Paulson Depo., 82:8–84:16, 87:23–88:9.
- 202. On June 19, 2015, Epic instituted an opposition proceeding before the Trademark Trial and Appeal Board to oppose registration of the YOURCAREEVERYWHERE mark. *See, e.g.*, Motion to Stay (Doc. 21).
- 203. The parties progressed in that proceeding, conducting discovery and other activities, for over six months. *See, e.g.*, Motion to Stay (Doc. 21).
- 204. On December 22, 2015, Epic filed its initial complaint in this Court. Complaint, Doc. 1.
- 205. Epic then moved to suspend the proceeding before the Board in favor of this litigation on December 28, 2015. Epic's Opposition to YCU's Motion to Stay (Doc. 26).
- 206. At the time that Epic moved to suspend its opposition proceeding, expert disclosures were due in less than a month, discovery closed in less than two months, and the trial period was set to begin in less than four months. The trial period would have concluded on September 6, 2016. *See* Motion to Stay (Doc. 21).
- 207. Based on the progression of Epic's opposition proceeding, YCU moved to stay this litigation and opposed a suspension before the Board because it would be the most efficient and inexpensive means to resolve the parties' dispute. Motion to Stay, Doc. 21.
- 208. The Court ultimately denied the motion to stay. Order Denying Motion to Stay, Doc. 46.

#### B. Discovery has revealed no actual confusion and, no actual damages

209. The YourCareEverywhere.com website has been live since March 2015. Hart Decl. at ¶ 22.





220. The USPTO rejected YCU's application for the mark YOURCARE for the following services on descriptiveness grounds:

providing temporary use of on-line non-downloadable cloud computing software for use in the healthcare field, namely, software for managing, storing, analyzing, maintaining, processing, structuring, reviewing, building, editing, distributing, communicating, organizing, sharing, referencing, monitoring and integrating healthcare information for healthcare providers, patients, and customers.

TTAB Decision on YOURCARE Appeal (Serial No. 86505916) (attached as Ex. 25 to Holt Decl.).

- 221. In affirming the trademark examining attorney's refusal to register the YOURCARE mark, the TTAB found persuasive the examining attorney's submission of a dictionary definition of the word "care" as "the provision of what is necessary for the health, welfare, maintenance, and protection of someone or something ... health care." TTAB Decision on YOURCARE Appeal (Serial No. 86505916), at 3-4 (attached as Ex. 25 to Holt Decl.).
- 222. The TTAB further cited the examining attorney's submission of "fourteen registrations for marks containing the word CARE in which CARE is disclaimed," e.g.:

#### Reg. No. 4002633 - CARE ELSEWHERE<sup>3</sup>

Services: Computer software for use in medical and healthcare fields, namely, computer software for managing, acquiring, storing, analyzing, maintaining, processing, structuring, reviewing, building, editing, distributing, communicating, organizing, sharing, referencing, monitoring and integrating information, and accompanying manuals sold as a unit; computer software for automating clinical and administrative healthcare processes;

#### Reg. No. 3693510 - CARE VISIBILITY

Services: Computer software for managing workflow, resource utilization, and patient care in a health care setting;

#### Reg. No. 3611361-ANTHEM CARE COMPARISON

Services: Providing an online tool, namely, providing temporary use of non-downloadable software that provides consumers with information about costs for various medical procedures;

#### Reg. No. 3686032 - CARE OPPORTUNITIES

Services: Application service provider, namely, providing, hosting, managing, developing, and maintaining a webbased application, web sites and databases that link medical information with medical claims data and the applicable standards of care, to provide clinical decision support for chronic medical conditions electronically; providing electronic clinical decision support, namely, providing a website featuring on-line non-downloadable software tools for making medical care decisions based on medical information, medical claims data, and standards of care, designed to assist health professionals with decision making tasks; and

#### Reg. No. 4240990 - EZ CARE

Services: Computer software for management, disease management, management in healthcare industry.

TTAB Decision on YOURCARE Appeal (Serial No. 86505916), at 4-5 (attached as Ex. 25 to Holt Decl.). The TTAB commented, "[t]hese registrations reflect that the word 'CARE' is considered descriptive by the USPTO when used in connection with software for healthcare related services." *Id.* at 5.

223. The YOURCARE mark was subsequently registered on the Supplemental Register of trademarks. YOURCARE Registration No. 5,009,851 (attached as Ex. 31 to Holt Decl.).

<sup>&</sup>lt;sup>3</sup> This is Plaintiff's mark and registration.

224. YCU's applications for the trademarks YOURCAREDATA, YOURCAREREFERRAL, YOURCAREANALYTICS, and YOURCARETRANSFER were refused registration on the Principal Register on descriptiveness grounds, and are now also registered on the Supplemental Register. YOURCAREANALYTICS Registration No. 4,990,560; YOURCAREDATA Registration No. 4,990,562; YOURCAREFERRAL Registration No. 4,990,559; YOURCARETRANSFER Registration No. 4,990,561 (attached as Exs. 26-30 to Holt Decl.).

Dated: December 2, 2016 Respectfully submitted,

By: /s/ Jennifer L. Gregor

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Angela Holt (pro hac vice)
David W. Holt (pro hac vice)
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